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Franklin Covey Client Sales, Inc. v. David Melvin : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

APPELLATE CASE NO. 981850-CA

FRANKLIN COVEY CLIENT SALES, INC.

Appellee

v.

DAVID MELVIN

#15

Appellant

Appeal from The Third Judicial District Court
In And For Salt Lake County State Of Utah

David S. Young, Judge

Appellant's Reply Brief

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I. ADDITIONAL STATEMENT OF FACTS

In its statement of facts, plaintiff has made several factual errors in its representations to this Court which are addressed below:

A. Melvin was employed as an account executive for Franklin Covey Co. (hereinafter FCC and its predecessor companies) from **1992** to 1997.[1] It is undisputed between the parties that Melvin was employed by FCC from 1992 to 1995 in his home country, the United Kingdom, where he excelled at his job and that the issues arising in this case relate solely to his later employment from 1995 to 1997 in the U.S. by FCC. (See Attachment B, Appellant's Brief, Declaration of David Melvin, page 1.)

B. **Melvin's Maryland claim was one for *unjust enrichment* not quantum meruit.** (See Appellee's Addendum, tab 2, Exhibit B.) The complaint *actually* alleges a claim for unjust enrichment.[2]

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[1] It is interesting plaintiff overlooks this fact since he later uses trips taken during this earlier period to buttress his extremely weak claim regarding both Melvin's ties to Utah and their nexus to business he conducted in Utah.

[2] The complaint states:

"[8.] Franklin terminated Melvin from his employment with the company as of September 12, 1997. Franklin did not pay Melvin any severance or other compensation in connection with his termination. After Franklin terminated Melvin's employment Franklin paid Melvin commissions for all sales of services and products that were *delivered* before September 12, 1997

[9] Franklin failed to pay Melvin commissions that he earned on sales contracts entered into prior to the termination of his employment, but for which Franklin has not yet delivered the service or product (at the time of his termination.)

Count I of the draft complaint specifically alleges that "it would be inequitable for Franklin to retain the benefits of Melvin's efforts without compensating him, that it breached its implied contact and was *unjustly enriched.* The count clearly states that it is an action for *unjust enrichment* and requests that equity be done. Melvin's compensation letter (Appellee's Addendum 4B) only states that he will be paid commission on "anything you sell."

C. **Plaintiff's claim that Melvin did not preserve the mechanical adoption issue is patently false.** As has been its consistent practice,

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[10.] The sale of Franklin's products and services generally requires the salesman to contact a potential customer, spend hours learning about the customer's business, develop an understanding of the customer's training needs, and educate the customer about how Franklin's services and products would meet the customer's needs. [11] It is the nature of Franklin's business that sales contracts are rarely signed when a sales person first contacts a prospective customer. Sales are based on a relationship between the customer and Franklin that the sales person develops. Competitors of Franklin have products and services that fill the same needs as Franklin's products and services, so the relationship that the sales person develops is a critical factor in a sale. The relationship may also help Franklin sell other products (for which the sales person does not receive a commission). The sales contracts are often signed months or even years after the sales person does the work in developing the relationship.

[12.] Melvin spent a large percentage of his time meeting with prospective customers and educating them about Franklin's services and products. He received no compensation for these efforts on Franklin's behalf. (Nor were these duties set forth in the document plaintiff refers to as the Compensation Agreement.)

[13.] At least eight customers (itemized in the draft complaint placed orders with Franklin, through Melvin, before September 12, 1997, but did not receive the services or products before September 12, 1997. Franklin failed to pay a commission to Melvin for these sales.

[14.] At least one customer placed one or more order with Franklin after September 12, 1997 as a direct result of Melvin's sales efforts. Franklin has not Melvin a commission on there sales."

plaintiff sets forth only half sentences or those half of the facts that it believes support its position and conveniently ignores the rest. This issue was raised before the trial court in Melvin's Reply Memorandum (See Attachment A to this brief, page 3.)

II. PLAINTIFF HAS FAILED TO ESTABLISH THAT MELVIN IS SUBJECT TO THE PERSONAL JURISDICTION OF THE UTAH COURTS.

The most important issue in this case is the lack of personal jurisdiction. Even plaintiff, grudgingly, has admitted that the standard of review on this issue is correction of error or the de novo review and, lacking jurisdiction, the case fails. Plaintiff, understandably buries this issue at the back of his brief because he has simply failed to show that the record supports the trial court's finding

Plaintiff's most notable argument, that he advances innumerable times because he has no other facts to support this claim is that Melvin made ten trips to Utah (over a period of 5.9 years.) The defendant asks this Court to examine these trips carefully. Five occurred before plaintiff acknowledges that Melvin was employed by FCC and while Melvin was still a resident of the U.K. They are all distant in time and purpose, all were for training and conferences; all were undertaken at FCC's instigation; and all but one were of extremely short duration. Even if this Court gives credence to the plaintiff's argument that the trips themselves somehow are evidence of defendant's transacting business within the state, the defendant contends that there must be a logical nexus between the timing of the trips and the

dispute before this Court. Of the remaining 5 trips -- all were short and undertaken at FCC's instigation; 4 were for training or conferences (at which no sales activity of any kind or nature has been alleged by *either* side), in fact Melvin was a relatively passive participant. The remaining trip, one day, also made at FCC's request for a client meeting with GEC. It is from this one meeting on the GEC account in which plaintiff finds a nexus to Utah because Melvin, in his Maryland complaint, alleged he procured a major new customer for FCC. However, the customer, GEC, is not a Utah corporation nor does it have any ties to Utah. The meeting took place in Utah because FCC wanted it in Utah. Melvin was asked to attend because GEC was UK based and Melvin, a UK citizen, had had a business relationship with GEC when he worked in the UK. No sales were consummated at that time and all further contacts and development took place in Maryland and New Jersey. In *Roskelly & Co. v. Lerco*, 610 P.2d 1307 (Utah 1980) the Court found that no personal jurisdiction existed on facts that were stronger than those in the instant case. (In *Roskelley*, plaintiff contacted defendant, a Kentucky corporation, for assistance in the repair of a machine manufactured by the defendant, sold to a non Utah resident who eventually sold it to the plaintiff, a Utah resident. Employees of the defendant went to Utah to supervise the installation and adjustment of the equipment in plaintiff's Utah plant. The Court found that the entry into Utah by the defendant's employees was solely for supervising the installation of the equipment and that, alone, did not constitute purposeful contacts with Utah that would support a finding of jurisdiction.) Presumably the defendant in *Roskelley* received compensation for its services while in

Utah which Mr. Melvin has not. Melvin has never received any compensation for either the trip, his time or from the proceeds of the contract. The facts in the instant case are weaker than those before the *Raskelly* court and clearly do not support a finding of special personal jurisdiction against the defendant.

In *Burger King v. Rudzeuirica,* 471 U.S. 462, 472 (1985) the court stated that the fair warning requirement was met "if **the defendant purposefully** directed his activities **at residents of the forum and the litigation results from alleged injuries that 'arise out of or related to'** these activities." The court noted that it is not sufficient to meet the fair warning requirement where the plaintiff *unilaterally* reaches beyond the forum. In the present case Melvin did not direct his activities toward residents of Utah. He directed his activities, as set forth in his initial contract with FCC and continued in the subsequent letter of agreement, to the Eastern Region. The only reason for his presence in Utah was that the plaintiff required him to attend meetings in Utah. His only business meeting was at plaintiff's behest with a non Utah corporation. The *Burger King* court, quoting *Hanson v. Denckla*, 357 U.S. 235 (1958) stated, "the defendant, **by its own acts** must purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The facts alleged by the plaintiff are legally insufficient.

Further it should be noted that all of the facts plaintiff alleges to support its allegations are derived from affidavits of the defendant. Plaintiff is a Utah corporation based in Utah where the majority of its employees live and work. All of its top personnel are in Utah and therefore, presumably available to plaintiff to

provide documentation as to defendant's alleged business activities in Utah. However, despite this wealth of resources plaintiff fails to provide this Court with anything to support its claim. In *Roskelley* at page 1310, the court noted "[W]here jurisdiction is challenged, plaintiff cannot solely rely on allegations of jurisdiction in the face of an affidavit by defendant which specifically contradicts those general allegations.". In *Neways, Inc. v. Mc Causland,* 950 P.2d 420 (Utah 1993) quoting *Anderson v. American Society of Plastic Surgeons*, 807 P.2d 825, 825 (Utah 1990) the Utah Supreme Court stated that plaintiff must establish jurisdiction by a preponderance of the evidence after making a prima facie showing before trial." Melvin notes that plaintiff has intentionally declined to support its allegations with any declaration or affidavit and has failed to meet its burden.

Where the Utah Courts have found that limited contacts by a defendant with the forum state convey personal jurisdiction invariably there has been some real or incipient harm to a Utah resident, unlike the instant case. *Kamdar & Co. v. Laray Co., Inc.* 815 P.2d 246 (Utah App. 1991) (the parties agreement, while made out of state, was made with the understanding that *the disputed services would be performed in Utah.* Over *eighteen* years, defendants availed themselves of the services of a Utah resident and suit arose over dispute regarding *payment to the Utah resident* for those services.) *Neways, supra* (out of state defendant *initiated* contact with Utah resident *to solicit business orders from Utah residents*, defendant's actions injured Utah resident.) *See also Burt Drilling, Inc. v. Portadrill,* 608 P.2d 244 (Utah 1980) (defendant *initiated* contact, to supply goods *to a Utah resident* reasonably knowing goods would be used in the state.)

On facts alleging stronger ties to the forum state than those alleged by plaintiff, the Utah courts have found a lack of specific personal jurisdiction. *See Roskelley, supra; Bradford v. Nagle* 763 P.2d 791 (Utah 1988); *Arguello v. Industrial Woodworking Marchine Co.,* 838 P.2d 1120 (Utah 1992)

"Generally, the more closely related the contacts are to the cause of action for which jurisdiction is taken, the fewer contacts are necessary to establish jurisdiction." *Rocky Mountain Claim Staking v. William,* 884 P.2d 1301-2 (Utah App. 1994), conversely where the nexus between the contact and the cause of action is non existent, one allegation that defendant once, at his employer's insistence, provided support on a sale in Utah to a non Utah corporation for one day is hardly sufficient to support plaintiff's allegation of *in personam* jurisdiction.

III. THE ISSUE OF MECHANICAL ADOPTION WAS RAISED BEFORE THE TRIAL COURT AND THE TRIAL COURT HAD AN OPPORTUNITY TO RULE ON IT.

Plaintiff quotes defendant's brief out of context. The sentence quoted in plaintiff's brief relates to the fact that this issue wasn't raised **until the filing of the post trial motions** because it wasn't relevant until after the trial court's initial rulings. (See Attachment A, page 3). Therefore, the issue was properly raised before the trial court and the trial court had an opportunity to rule on it which it failed to do. **Defendant has raised no other argument, as it cannot, to support its contention that the trial court did not mechanically adopt findings of fact and conclusions of law prepared for it and presented to it by counsel for the plaintiff.** Clearly plaintiff's counsel having presumably searched the record of the

case admits defeat, that there is nothing in the record that indicates the indicia normally accepted by the Appellate Courts in Utah that the trial court adequately deliberated or considered the merits of the case. *State v. James,* 858 P.2d 1012 (Utah App. 1993); *Alta Industries, Ltd. v. Hurst,* 846 P.2d 1012 (Utah App. 1993); *Automatic Control Products, Corp. v. Tel-Tech, Inc.* 780 P.2d 1258 (Utah 1989); *The Boyer Company v. Lignell,* 567 P.2d 1112 (Utah 1977).

IV. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION, BECAUSE THE PLAINTIFF WAS NOT THE PROPER PARTY, NOR AS AN ASSIGNEE DID PLAINTIFF FULFILL ITS NOTICE OBLIGATION TO THE DEFENDANT.

Plaintiff's contention that there was *only one employment relationship* is unsupported by the facts unless the employment relationship being alleged is between the defendant and FCC.[3] In response to Melvin's argument that in order for plaintiff to be considered an assignee under Utah law per *Lynch v. MacDonald,* 367 P.2d 474 (Utah 1962) and to then sue the defendant based upon that assignment, it must provide notice to the defendant of the assignment, it has provided one item, a W-2 sent to Melvin months after he was terminated. It has conceded the fact, based upon *Delta Traffic Serfices, Inc. v. Sysco Intermountain Food Serices,* 944 F.2d 911, (10th Cir. 1991), that "the burden of proving an assignment is upon him who claims thereunder." *Accord Alpine Associates, Inc. v. KP&R,* 802 P.2d 1119, 1121 (Colo. App.

[3] In is interesting to note that he also argued that there was only *one employer* to the trial court also, but he appears to have dropped this argument to this Court, perhaps because plaintiff has convincingly demonstrated to this Court that wholly owned subsidiaries and parent companies are considered separate legal entities under the law.

1990). By its own admission, the "Consent to be Bound[4]" "was not an actual assignment but merely "notice to the court of the assignment," and therefore, not proof on which the trial court could base its decision regarding the relationship between the parties.

In response to Melvin's argument that he was not provided with adequate notice of the assignment, plaintiff repeatedly dredges up the one W-2 provided to Melvin in January, 1998 for the tax year, 1997 upon which the name Franklin Covey Client Sales (hereinafter FCCS) appears. Until alerted by plaintiff's counsel that this item existed, Melvin had been completely unaware that Franklin Covey Client Sales' name was on this document or any other. In fact Melvin had never heard of FCCS until he was sued by FCCS in Utah. This document should be contrasted with the following documents provided to or on behalf of Mr. Melvin by his employer FCC, noting FCC (or a predecessor company) as Mr. Melvin's employer:

a. All letters of appointment/agreement (at least 3) signed by FCC and Melvin.

b. All applications to the INS submitted on Melvin's behalf.

c. All pay stubs that Melvin received during his employment.

d. Business cards provided to Melvin by FCC identifying FCC as his employer.

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[4] In its brief plaintiff contends that there is "absolutely no dispute between the parties to the assignment as to its validity. This is irrelevant since FCC, according to the plaintiff is not a party to this matter and therefore, its belief about the assignment is immaterial. Defendant has consistently disputed the validity of the assignment which was also addressed before the trial court, in his initial brief and also herein.

e. Letterhead provided to Melvin by FCC with FCC prominently featured, (not FCCS) for use for Melvin's correspondence on all FCC related matters.

f. Sales reports and forecasts routinely generated by FCC to its employees that identify Melvin as a member of the team for the Eastern Region of FCC.

Plaintiff offers the W-2 in the face of this overwhelming evidence, and argues that this Court accept it as sufficient notice of the assignment to the defendant as required by the Utah Courts, but it is not. In *4447 Associates v. First Security Financial,* 889 P.2d 467, 470 (Utah App. 1995) the court notes: [B]ecause 4447 Associates would benefit from a favorable determination of its rights as an assignee seeking to enforce an assignment, *it bore the burden of proving* First Security received notice of the assignment." In *4447* the court found that the mailing *of the assignment documents* (not a mere filing informing the court of their existence several months after the issue came before the trial court) with no proof that such documents were received by the defendant was *insufficient. In accord, People's Finance & Thrift Co. v. Landes,* 503 P.2d 444 (Utah 1992).*In Bank of Salt Lake v. Corp. of President of Church of Later Day Saints,* 534 P.2d 887 (1975), the assignee did send notices of the assignment with copies of the assignment documents. While the court seems to accept the actions as adequate attempts at notice, it still found the notice inadequate because it was served on an employee who had no authority to accept such notice. In any event no such action was undertaken by the plaintiff herein.

What is notable in all these cases is that an *actual* notice was served (or attempted to be served before the commencement of any lawsuit), *the notice document contained the actual assignment documents* as well as notice of the assignment, and they were served within a reasonable period of time after the documents were executed. Here, plaintiff, by his own admission, merely noticed the court and the defendant that an assignment had been made, (after his status to prosecute this suit had been called into question by the defendant), the actual assignment was not provided (either to the court or the defendant) prior to the court's ruling on the summary or declaratory judgments, nor is it clear from the actual document when it was signed. Since it is undated, when the actual assignment occurred is unknown.[5]. In any event, Judge Young never addressed the issue of the adequacy of the notice, nor did he make findings related to these issues. Moreover, the effect of the so called "Consent to be Bound" definitely prejudiced the defendant's rights and under the stand of review set

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[5] Plaintiff notes in his brief that the "Consent to be Bound" was signed by FCCS's counsel Defendant challenged plaintiff's counsel's right to sign the document since there was no evidence *before the Utah Court*, that plaintiff's counsel also represented FCC. In defense plaintiff claims that Melvin "knew" that plaintiff's counsel represented FCC because he filed an appearance on behalf of FCC in a case in federal district court *in Maryland.* He presents no other argument to support his contention for the correctness of his behavior. Yet it should be noted that a case has been filed in Circuit Court for Montgomery County, Maryland in which Melvin is the plaintiff and FCC the defendant. This case has been ongoing for some time. Plaintiff's counsel has filed no appearance and, to Melvin's knowledge, and from a review of the public record, there is no indication that plaintiff's counsel represents FCC. Plaintiff's argument is disingenuous at best and wrong at worst. One appearance in federal district court in Maryland hardly provides the kind of notice that, for instance, a notice of appearance filed in District Court in Utah would provide. Melvin is absolutely justified in questioning whether plaintiff's counsel had the capacity or authorization to file the questionable "Consent to be Bound," and so should have before the trial court.

forth in *4447 Associates*, this Court should declare the action a nullity. If a nullity then FCCS no longer retains its status as a real party at interest and the suit must be dismissed.

(Plaintiff's arguments regarding the alleged benefits and additional protections offered to the defendant by the executive of this document are disingenuous and self serving at best and have already been addressed in Melvin's brief and will not be repeated here.)

V. THE TRIAL COURT ABUSED IT DISCRETION IN FAILING TO MAKE ADEQUATE FINDINGS OF FACT AND THEN IN FINDING THAT THE FACTS PRESENTS IN THE RECORD SUPPORTED ITS SUMMARY JUDGMENT ORDER.

Plaintiff's counsel incorrectly alleges to this Court that it presented "two unambiguous and undisputed agreements" to the trial court. While they were undisputed and unambiguous by plaintiff's counsel, they were neither to the defendant who argued these facts vociferously to the trial court.

As noted above, plaintiff's counsel, misinterpreting defendant's draft Maryland complaint interpreted this case as one for quantum meruit. Rather, as set forth above, the complaint clearly requested relief for unjust enrichment or restitution and the facts fit such a claim. *See Davies v. Olson* 746 P.2d 264 (Utah App. 1987), quoting *Corbin on Contacts* § 19 at 44, 46. *Also Berrett v. Stevens,* 690 P.2d 553, 557 (Utah 1984), "[T]he measure of recovery is the law of the benefit conferred on the defendant (the defendant's gain) and not the detriment incurred by the plaintiff, see *First Inv. Co. v. Andersen,* 621 P.2d 683, 687 (Utah 1980), or necessarily the reasonable value of the plaintiff's services." "Unjust enrichment of a person occurs when he has and retains

money or benefits which *in justice and equity* belong to another." *American Towers Owners Association, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182 (Utah 1996) citing *Commercial Fixtures & Furnishings, Inc. v. Adams,* 564 P.2d 773-776 (Utah 1977). The facts set forth in the Maryland complaint clearly support the test for unjust enrichment set forth by the Utah Courts in the cases cited above.

The remaining question was whether defendant was barred based on the April, 1997 letter of agreement. Through misquotation and artful use of nomenclature FCCS attempts to mislead this Court and argues that there were no material facts in dispute. FCCS first undisputed material fact was that *FCCS* was defendant's employer from *1995* to 1997. First, as all of the documentary evidence, including letters of agreement, etc. show, *FCC* was defendant's employer not *FCCS*, and *FCC* employed the defendant *from 1992* to 1997. Thus the plaintiff's first material fact is demonstrably untrue.

Plaintiff's second alleged undisputed material fact involves a statement in the "Compensation Agreement," a letter dated April 9, 1997. (See Plaintiff's Addendum 4B.) That letter does not mention FCCS anywhere, rather the letterhead refers to Franklin Quest Consulting Group, *Formerly Shipley Associates*, (which was later identified in plaintiff's filing to the Maryland federal Court as a wholly owned subsidiary of FCC. Accordingly, the plaintiff has admitted that it is not the entity that entered into the April 9, 1997 agreement.

It's third material fact relates to the Release signed by the defendant, (Plaintiff's 4C), again FCCS is not mentioned anywhere. Finally the defendant notes

that neither the plaintiff's allegation to this Court nor his addendum (as well as these same allegations to the trial court) are not supported by any affidavits, sworn testimony, or other form of admissible evidence. Plaintiff's one paltry offering, the W-2, was sent to defendant at least four months after his termination.

Plaintiff's sole legal argument in support of its claim that the trial court did not abuse its discretion in finding that the facts presented to it supported its summary judgment Order, is that the defendant is not entitled to relief for a claim of *quantum meruit* because there is an express agreement governing his compensation with FCC. FCCS's counsel's argument is totally misplaced.

First, there is no express agreement between FCCS and the defendant (nor sufficient notice of an assignment as discussed above.)

Second, even if the language in FCC's letter of agreement with the defendant applied, it does not preclude additional compensation. This letter adopts by reference a prior "Employment Agreement" which is not part of the record. Without this additional document, the plaintiff's submission was incomplete. The section of the letter addressing compensation stated that the defendant will be paid on a commission basis. The letter goes on to state FCC's policy that commissions are only paid on services delivered while the defendant is employed by FCC. This description of an unwritten policy does not state a definitive rule. Further, FCC ***engaged the defendant to sell products as well*** **as services.** There is no provision in this letter for payment and timing of payment for products sold. It is plaintiff's contention that this brief description of policy is a complete description of the contract terms

between FCC and the defendant on the issue of the timing of sales and commissions earned. This is not the case, at a minimum in the case of products sold. The language quoted by plaintiff was insufficient to support its motion for summary judgment or the trial court's' findings thereafter

Third, ***the agreement presumes that the employment relationship would not be terminated by FCC in bad faith.*** The quoted provision does not apply to FCC's termination of the defendant under those circumstances.

Fourth, the language of the release explicitly leaves open the question of compensation for sales that were not completed before FCC's termination of the defendant's employment, a number of which are listed in the defendant's Maryland complaint.

Fifth, while the defendant was admittedly an at will employee of FCC, no one may terminate an at will employee in violation of federal, state or local law. Under a suit pending in Maryland Circuit Court, the defendant has sued *FCC* for discrimination. If the defendant prevails, it will establish that *FCC terminated the defendant in bad faith.* Furthermore the termination may not have been legally effective. Either way, a ruling in the defendant's favor will establish that FCC had no legal right to (a) induce the defendant to enter into a commission only employment agreement providing for commissions to be cut off as of the date of the last day of work; (b) urge the defendant to perform his job based on an expectation of continued employment; and then (c) terminate the defendant illegally and in bad faith.

Sixth, the release the plaintiff attaches to all its pleadings is short and to the point. It refers to *sales completed before termination on September 12, 1997.* The plaintiff's complaint addresses sales completed where the delivery of services had not been completed before defendant's termination, sales for products for which the defendant was not compensated and "future sales or for seminars held after the effective date of his termination." (Plaintiff's Addendum 2). Since the release applies only to sales of *services* before the effective date of the defendant's termination, it clearly is not applicable in this case.

In order for the trial court to have granted the plaintiff's motion for summary judgment, the court must find that there was a contract of employment between the parties and that the contract addressed the necessary issues. "[I]n evaluating a contract, this court must first ascertain whether the contract was integrated and second whether it was ambiguous." *Bailey-Allen Company, Inc. v. Kurzet, et al,* 876 P.2d 421 (Utah 1994) citing *Ron Case Roofing & Asphalt Paving, Inc. v. Bloomquist,* 773 P.2d 1382, 1385 (Utah 1989). In the *Bailey* case, the court found that the contract was ambiguous in that it provided no guidance relevant to the proper remedy for breach. (The same is true in the instant case.) The court, therefore, held that no enforceable contract existed and recovery under quasi contract was appropriate. The contract fails in the instant case fails on the same grounds as that in *Bailey-Allen,* thereby allowing for recovery for unjust enrichment.

In addition, the issue exists as to whether or not there was ever a meeting of the minds between FCC and Melvin. As noted in paragraph 29 of his supplemental

declaration (Appellant's Brief, Attachment C, paragraph 29), the defendant assumed when he signed the letter of employment that the commission term in the Compensation letter did not apply if FCC were to unilaterally terminate him. Therefore, there does not appear to have been a meeting of the minds on or about April 9, 1997, which would give rise to a binding contract.

In order to dispose of the case via summary judgment the trial court had to determine:

1) whether or not there was a meeting of the minds that created an express contract evidenced by the letter of employment;

2) whether or not the plaintiff acted in bad faith;

3) whether the disputed sentence in the April, 1997 employment letter is applicable to the relief the defendant requested;

4) whether quantum meruit applies;

Rule 56 U.R.C.P. requires a trial court to specify in its order the finding the facts that appear without substantial controversy. In its summary judgment Order the trial court stated "With respect to Plaintiff Franklin Covey Client Sales, Inc.s Motion for Summary Judgment, there are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law.[6]" The trial court failed to make the necessary

[6] Yet plaintiff argues to this court that these meager findings were sufficient to support the trial court's declaratory judgment Order which stated: 1) Franklin Covey (which Franklin Covey is unclear) has no contractual, implied or other obligation to pay the Defendant Melvin any compensation related to seminars held or future seminars scheduled to be held or products sold subsequent to September 12, 1997; (2) the Release signed by Defendant Melvin on November 13, 1997 bars all claims related to payment of compensation or commissions; and (3) Franklin's policy and

findings. "Summary judgement is appropriate only when there is no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Crowther v. Mover,* 876 P. 2d 876, 878 (Utah App. 1994). "[A]ll inferences must be resolved against the moving party when a determination is made as to whether a factual dispute exists". *See Kline v. Signet Bank/Maryland,* 651 A. 2d 422 (Md. App. 1995), citing *Berkey v. Delia,* 413 A.2d 170 (1980). "On appeal from a summary judgment, we view the facts and inferences fairly drawn from them in the *light most favorable to the losing party.*" *Winegar v. Froerer Corp.* 813 P.2d 104, 107 (Utah 1991). "A summary judgment may be granted only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Winegar* at page 23; Rule 56(c), U.R.C.P.

Clearly each and every material fact alleged by the plaintiff to be undisputed was, in fact, disputed by Mr. Melvin. In this case Melvin met his burden of presenting some evidence, by affidavit, or otherwise, raising several credible issues of material fact. *See Dupler v. Yates* 351 P.2d 624, 637 (Utah 1960). Yet the trial court chose to ignore each and every one. "Without adequate findings of fact, there can be no meaningful appellate review," *Willey v. Willey,* 866 P.2d 547, 551, 555 (Utah Ct. App. 1993). The record created by the trial court fails to allow for adequate review. "To allow the trial court to impose speculation on the adjudicatory process violates the basic premise upon which our judicial system is founded. All parties are absolutely entitled to a fair and impartial hearing and adjudication of their affairs," *Willey v. Willey,* 914 P.2d 1149, 1150 (Utah Ct. App.1996). The defendant submits that

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practice with respect to the payment of commissions to separated Account

throughout this process he has been denied both the substance and even the *appearance* of a fair and impartial adjudication. The defendant further submits that in extraordinary cases "when it is made to appear that the court has failed to correctly apply principles of law or equity or that the judgment has so failed to do equity that it manifests a clear abuse of discretion this court on review will take appropriate corrective action in the interests of justice." *Willey v. Willey*, 914 P.2d 1149, 1150 (Utah App. 1996) citing *Watson v. Watson*, 561 P.2d 1072, 1073-4 (Utah 1977). Defendant submits that, at a minimum, the trial court abused its discretion in its finding of facts requiring remand, and that, at this Court's discretion corrective action beyond remand would be appropriate in the interests of justice since the trial court so completely failed to apply principles of fairness, law and equity.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN APPLYING ITS FINDINGS TO MARYLAND LAW.

While the defendant did not raise this issue in his brief to this Court, the plaintiff has felt it necessary to raise and argue this issue. It can be addressed (and dismissed) summarily.

First, plaintiff contends that the trial court did not attempt to extend its ruling to Maryland, (see footnote 2 declaratory judgment Order, "[T]his Court finds that the declaratory relief furnished herein is required under both Utah and Maryland law.") and only included this statement in its ruling to avoid the necessity of engaging in a conflict of laws analysis. There is no indication from the record that a conflict of laws analysis was either considered or sought.

Executives is not violative of law.

Second, the whole import of plaintiff's actions and the trial court's rulings was to foreclose the defendant his day in court, any court, if possible. This action is consistent both with those actions and intent.

Third, the ruling is irrelevant, even if the plaintiff were to try to have the trial court's ruling upheld to prevent judicial action in Maryland. See *Liberty Mutual Insurance Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384.88 (2nd Cir. 1992) in which the Second Circuit recognized that a court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." Accordingly, a court may take judicial notice of another court's order only for the limited purpose of recognizing the "judicial act" that the order represents or the subject matter of the litigation. *See also, United States v. Garland*, 991 F.2d 328, 322 (6th Cir. 1993); *Colonial Leasing Co. v. Logistics Control Group Int'l*, 762 F.2d 454, 459 (5th Cir. 1985); *FDIC. O'Flahaven,* 857 F. Supp. 154, 157-58 (D.N.H. 1994). Thus, plaintiff's attempt to end run the Maryland Courts through his misuse of the Utah Courts is unavailing.

Article 7, Section 7 of the Utah Constitution, states that "[N]o person shall be deprived of life, liberty or property without due process of law.: The overreaching, abuse and misuse of the Court of Utah in this case by the plaintiff in its efforts to deny the defendant even the appearance of due process cries out for redress.

CONCLUSION

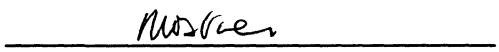
Wherefore, based upon the foregoing and for all of the reasons stated above, it is respectfully requested:

1. That this Court enter an Order dismissing the instant action for lack of jurisdiction or in the alternative remand this matter to the trial court with instruction to enter the appropriate judgment of dismissal in favor of the defendant.

2. That this Court enter an Order dismissing the instant action on whatever grounds it deems appropriate or in the alternative remand this matter to the trial court with instruction to enter the appropriate judgment of dismissal in favor of the defendant.

3. Further, that this Court enter an Order awarding costs and attorney's fees to the defendant or in the alternative remand this matter to the trial court with instructions to enter the appropriate judgment for costs and attorney's fees.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 1999, I have served two copies of the Reply Brief for the Appellant upon counsel for the Appellee, Steven Bednar, Manning, Curtis Bradshaw and Bednar LLC, Newhouse Building, 3rd Floor, 10 Exchange Place, Salt Lake City, Utah 84111 by first class mail, postage prepaid.

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ADDENDUM

ATTACHMENT A

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Defendant, *pro se*

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH**

Franklin Covey Client Sales, Inc. Plaintiff, v. David Melvin, Defendant.	Civil Case No. 980901616MI Judge David S. Young

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT OR ORDER

Pursuant to Rule 4-501of the Utah Code of Judicial Administration, the *pro se* Defendant respectfully submits this reply memorandum in support of his Motion for Relief from Judgment or Order pursuant to Rule 60(b)(1) of the U.R.C.P., and in response to plaintiff's memorandum states as follows:

1. While the plaintiff attempted to collapse both Rule 60 motions filed by the defendant into one response, the defendant will treat them separately and requests separate rulings as they relate to very different issues with different results.
2. After trotting out all of the same tired arguments, the essence of plaintiff's response to the defendant's Rule 60(b)(1) motion is that he now claims that the filing was not an

actual assignment but rather a pleading alleging the assignment. In any event it still fails because:

a. The "pleading" fails to conform with the requirements of Rule 17 which requires that the case be pursued by the "real party in interest," and makes no provision for such assignments.

b. Section 78-33-2 and 4 likewise require standing to sue and make no provision for the "assignment" of those rights to a non party.

c. In fact, as usual, plaintiff has taken a highly novel position to protect an act that is not authorized by statute or case law and, of course, asserts none for this court to rely upon if it were to rule in plaintiff's favor. It is ludicrous to assert that the Consent to be Bound document is "evidence of an assignment" that had previously been made when there is no legal basis for the assignment to be made at all. The plaintiff engages in this sophistrific bootstrapping to no purpose. A party either has standing or it doesn't. Absent specific statuatory authorization, it can't be assigned and no such authorization exists. *Estate of Martin Haro v. Haro,* 254 UAR 19, 20 (Utah App. 1994). The plaintiff is not "a party authorized by statute" to sue in another's name without "joining the party for whose benefit the action is brought" Rule 17(a) nor does it fall within any of the other Rule 17(a) exceptions. Therefore, whether the Consent to be bound is the assignment itself or merely evidence of the assignment doesn't matter since no authorization exists.

3. This court has never ruled upon the defendant's contention that the evidentiary value of the so called "Consent to be Bound" was substantially outweighed by the danger of unfair prejudice as raised in the defendant's original motion. *O'Banion v. Owens-Corning*

Fiberglass Corp., 968 F.2d 1011 (10th Cir. 1992) and cases cited therein. Should the court find this to be true, then the plaintiff's whole case falls apart. Certainly, since this issue has not previously been raised it is appropriate to bring it to the trial court's attention prior then raising it on appeal. "Rule 60(b)(1) provides a trial court may relieve a party of a judgment in a case of . . . mistake of law by the trial court." *Bischel v. Merritt*, 278 UAR 29, 30 (Utah Ct. App. 1995).

4. The Motion also raises the issue that the findings of fact are insufficient to support the conclusions of law. "It has long been the law in this state that conclusions of law must be predicated upon and find support in the findings of fact." *Gillmor v. Wright*, 209 UAR 6, 9 (Utah 1993) *citing cases back to 1917.* Without the actual documents, this argument could not be presented to this court. Again, it is appropriate and a proper use of judicial resources to bring this to the attention of the trial court, before raising the issue on appeal. *See Bischel.*

5. The plaintiff's contention that Maryland case law has been briefed and presented to this court is just false. Either that or plaintiff neglected to serve that pleading on the defendant. Rather this court, "mechanically adopted findings of fact and conclusions of law prepared and submitted" by plaintiff "without modifying them or changing them in any respect." A process frowned on by the appellate courts. *Atlantic Control Products Corp. v. Tel-Tech, Inc.* 780 P.2d 1258, 1260 (Utah 1989). And, the plaintiff responded to this opportunity by trying to immunize itself in every way it possibly could.

6. Finally the plaintiff argues that the defendant's Rule 60(b)(1) motion is an attempt to gain a second round in the trial court before filing its appeal. To the contrary, the defendant is merely trying to obtain an adequate record to appeal from. "Without adequate findings of fact, there can be no meaningful appellate review," *Willey v. Willey*,

866 P.2d 547, 551, 555 (Utah Ct. App. 1993); *Willey v. Willey*, 914 P.2d 1149, 1151 (Utah Ct. App. 1996); *Willey v. Willey*, 333 UAR 8, 10 (Utah, 1997) and an appellate court is forced to remand an action to the trial court (on occasion, several times) in order to obtain adequate findings to review. This is wasteful of judicial resources and places an unfair burden on the party forced to continually apply to the appellate courts for relief.